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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

MEMORANDUM OF RESPONDENT COURT AND THE COLORADO RIVER WATER CONSERVATION DISTRICT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

In responding to the petition for a writ of certiorari in *United States* v. *The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, the respondent court and the Colorado River Water Conservation District urged this Court to grant the writ because ". . . of the importance of determining now the

issue of state court jurisdiction under 43 U.S.C. § 666". (Brief on certiorari at 1). Since that same issue is at the heart of the pending petition in No. 812, we support the granting of the writ here. However, just as we differed with the view of the Government in No. 87 that the court below erred, we differ here for additional reasons, among which are the Government's assumptions as to Colorado's 1969 water law, which we set forth briefly herein for the consideration of the Court in its action on the petition.

STATUTE INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 provides as follows:

> Suits for adjudication of water rights
>
> (a) *Joinder of United States as defendant; costs.*
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) *Service of summons.*

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) *Joinder in suits involving use of interstate streams by State.*

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

QUESTIONS PRESENTED[1]

(1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.

(2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

Interest of these respondents. The judge and the referee of the respondent District Court for Water Division 5 in Colorado are charged under the Water Right Determination and Administration Act of 1969[2] (1969 Act) with certain judicial duties and functions relating to claims to the use of waters arising therein.

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[1] These are identical with those presented at p. 2 of our brief in No. 87, as are the Government's questions in both cases, for all practical purposes.

[2] Colo. Rev. Stat. § 148-21-1, et seq. (1963), *as amended,* (1969).

The proper discharge of these duties requires jurisdiction over all interested and necessary persons.[3]

The Colorado River Water Conservation District is a public agency of the State of Colorado, embracing a 15-county area, established for the purpose of conserving and developing the waters of the Colorado River and its tributaries within the District area.[4] Water Division 5, in which this case arises, consists of " . . . all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison River; . . ."[5] With that exception, Water Division 5 thus includes the Eagle River system which is involved in No. 87, this Term, as well as the rest of the Colorado River system within the State, in all of which the District has numerous rights and claims to the use of water under its statutory responsibilities.

Background of this case. This case commenced, as did No. 87, by service of a notice in conformity with 43 U.S.C. 666 (b)[6] upon the Attorney General of the United States. This notice contained a resume of ap-

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[3] "Person" is defined in § 148-21-3(2) as "an individual, a partnership, a corporation, a municipality, the state of Colorado, the *United States of America*, or any other legal entity, public or private." (emphasis added).

[4] Colo. Rev. Stat. § 150-7-1 (1963).

[5] Colo. Rev. Stat. § 148-21-8(6) (1963), *as amended*, (1969). It is important to note that Water Division 5 is for all practical purposes identical with what was formerly designated Irrigation Division 5. Under the former law there were seven such Irrigation Divisions for water rights administration purposes within the state just as there are now seven Water Divisions for like purposes.

[6] The requirements of Fed. R. Civ. P. 4(d)(4) were also observed.

plications concerning water rights in Division 5 made during December, 1969.[7]

In response to the language of the notice that "[y]ou are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such application . . .", the Government on March 31, 1970, filed a motion to quash service together with a supporting memorandum. The motion asserted (1) that the proceedings were not of the kind to which the United States had consented to be sued and (2) that there had not been "service of process" within the meaning of 43 U.S.C. 666. The respondent court thereupon ordered that any rulings on applications filed with the water clerk be deferred until the motion of the United States had been heard and determined. The District filed an appearance and memorandum in opposition to the motion to quash and argument was heard by the respondent court on April 9, 1970.

In its order entered April 21, the respondent court held with regard to (1) that the rationale of the Colorado Supreme Court on jurisdiction in the case here now as No. 87 was equally appplicable, adding:

> ... Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5. (Pet. 11).

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[7] Other statutory requirements of notice were satisfied such as publication in newspapers published in each county in the Division and by mailings to affected persons, including those having specifically requested notice. Colo. Rev. Stat. § 148-21-18(3) (1963), *as amended*, (1969).

As to (2), the respondent court pointed out that the language of 43 U.S.C. 666(b) speaks of "Summons *or other process*", and the papers involved constituted notice properly served under the statutes involved (Pet. 12). While thus overruling the motion to quash, the respondent court noted it would entertain ". . . where appropriate, applications by the United States for reasonable extensions of time." (Pet. 13).

On May 4, 1970, the United States filed a "Motion for Extension of Time to File Statements in Opposition or Other Response." This motion made reference to the pendency of No. 87[8] in this Court and suggested an extension of time until this Court had spoken, anticipated to be by February, 1971. In further support of the motion, the Government stated:

> (2) The United States is in the process of gathering a catalog of its multitude of water rights within Water Division 5, but the cataloging procedure will not be completed in the immediate future. Therefore, the United States is unable at this time to determine the effect of the Water Right Applications filed upon its water rights. Hence, additional time is needed for the United States to physically gather the information needed to form a response.

On July 1, 1970, the respondent court denied this motion on the basis that it was obliged to proceed under the 1969 Act in the absence of any order or mandate from any appellate court to desist, noting that considerable time had already elapsed since its April ruling. That same day, the Government served the respondent court with a copy of an application for a writ of prohibition which was being filed in the Supreme Court of

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[8] At that time the Eagle County case was No. 1178, Oct. Term, 1969.

Colorado. This application did not seek a stay of the proceedings in the respondent court (cf. Pet. 4). Instead, it sought prohibition against the respondent court from asserting jurisdiction over the United States, or adjudicating any of its rights "for the reason that said Court and Judge are wholly without jurisdiction over the United States . . . .", in the identical language in which prohibition had been sought in what is now No. 87. The Supreme Court of Colorado, having already conclusively ruled in its opinion in that case that the respondent court did have jurisdiction, on July 9, 1970, denied *en banc* and without further opinion the application for prohibition. This petition for a writ of certiorari followed.

ARGUMENT

In seeking certiorari in No. 87, the United States assured this Court that there was finality of judgment below on the issue the United States wanted reviewed and that this issue was "clearly separable" from the merits of the litigation pending in the respondent court concerning the relative rights and priorities of claimants to water rights in Water District 37. This separable issue was whether:

> . . . the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United States, including its reserved rights . . . . (Pet. in No. 87 (No. 1178, Oct. Term, 1969) at 9).

We there supported certiorari and review by this Court now rather than later because it was clear that this basic jurisdictional question would persist throughout any Colorado water rights proceedings involving the United States.

The petition in No. 812 further evidences the persistence of this basic jurisdictional question. However, while acknowledging that the 1969 Act eliminated some of the infirmities alleged to exist in State law in No. 87, the United States needlessly complicates the basic jurisdictional question by complaining that ". . . the new procedures are, if anything, more burdensome on the government . . ." (Pet. 6).

It was our purpose in No. 87 to demonstrate to this Court the overwhelming intent of the Congress in enacting 43 U.S.C. 666 to subject all of the claims of the United States, including its reserved rights, to adjudication in state water rights proceedings.[9] This was clearly the objective despite any variances in State procedures which might be involved. The goal was to perfect the longstanding adjudicatory and administrative processes of the States by authorizing the joinder of the United States where the existence of its claims to the use of water made the Government's presence necessary, in order to achieve the requisite certainty in this field. The nature of these processes was not the problem. The problem was the necessity of the presence of the Government, if these processes were to be fully effective.

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[9] The proceedings in Congress over the 1949-1952 period concerning bills such as S. 18, "to authorize suits against the United States to adjudicate and administer water rights", and which resulted in 43 U.S.C. 666, are summarized in Brief for Respondents in No. 87 at 11-29, and pertinent documents are set forth therein at 1e-15e. A recent comment notes ". . . the complete absence [in] the legislative history of any indication that the McCarran Amendment was to apply to less than all of the federal water rights." Comment, *Adjudication of Federal Reserved Water Rights*, 42 U. Colo. L. Rev. 161, 166 (1970).

9 be recalled that the United

In this connection, it will on in No. 87 told the court

States in seeking prohibitio

below that if it:

the United States could ad-

> . . . were to hold that th hts in proceedings such as
> judicate all of its righ priority date of its reserved
> this and obtain the true pts, most of the objections of
> and appropriative right these proceedings would be
> the United States to th United States could not, even
> removed. While the U fendant under 43 U.S.C. sec.
> then be joined as a defe hat an *entire river system*
> 666, for the reason th the United States would be
> would not be involved, t its rights properly adjudi-
> assured it could have i ear as plaintiff in a Colorado
> cated if it chose to appe ation . . . (emphasis added)
> Water District applicat
> (A. 14, No. 87).

In the present petition the U United States says that ". . .
some of the defects of the ol old law have been eliminated
(*e.g.* each of the 70 districts cts under the old law encom-
passed only a small segment ent of a river system) . . ."
(Pet. 6). From this we can an assume that a major objec-
tion to being joined in Col colorado water adjudications,
i.e., the problem of the "en entire river system," is moot
under the 1969 Act. As far far as adjudicating "all of its
rights" and obtaining "th the true priority date of its
reserved and appropriative ive rights" are concerned, the
court below made it plain in beyond question that these
matters were not at all fore closed and that the respond-
ent court could bring befor fore it all those necessary to a
full determination of all cla claims once the United States
had presented its specific c ic claims for adjudication (A.
37-39, No. 87).[10]

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[10] It is clear to us that the filin filing of claims by the United States
seeking to antedate previous dec decrees and proceedings will neces-
sarily result in an "inter sese" viewed West End Irr. Co. v. Gar "adjudication. The court below
(1947), as probably controlling, Garvey, 117 Colo. 109, 184 P. 2d 476
this view of the United States (A ing, and was inclined to agree with
es (A. 38, No. 87).

We fail to see how the proceedings under the 1969 Act can vary these principles as enunciated by the court below. As is quite evident from its opinion, that court had the 1969 Act in mind and regarded ". . . as immaterial to the jurisdictional question presented . . ." (A. 22, No. 87), whether further proceedings in the case were under the new law or the old. The 1969 Act represents a streamlining of the adjudicatory procedures whereby Colorado has substituted a basin-wide court division concept for the previous smaller district concept and has freed, in some measure, the adjudicating court from the tedium of investigating claims, leaving this to a court-appointed referee. Nevertheless, the actions of the referee, and any protests and oppositions filed with regard to claims, go to the court for judicial disposition. While the United States downgrades the referee function calling it "extremely limited" and "administrative rather than judicial," the fact is that referee proceedings were provided for in the prior law, similarly under the supervision of the court. Though appearing to the Government to effect many "procedural" changes, the 1969 Act in fact simply draws from the previous adjudication procedures and case law relating thereto.[11]

In its petition, the United States makes clear to this Court that the identical subject matter which is involved in No. 87 is involved here:

> As in the former Water District 37, the United States claims two types of rights in the larger

[11] As the court below noted (A. 44, No. 87), the United States filed with it a supplemental brief on the subject of the effect of the 1969 Act upon the questions involved, if any. This supplemental brief advised that "upon careful review" of the 1969 Act the Government was of the opinion that its position below was "not affected in any significant way". (Record in No. 87, at R. 152).

> Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law . . . . (Pet. 5)

This statement, often repeated by the Government, illustrates the error of its position. Jurisdiction is specifically accorded to State courts under 43 U.S.C. 666 (a) where ". . . the United States is the owner of or is in the process of acquiring water rights by *appropriation under State law* . . ." (emphasis added). The Government concedes this (U.S. Brief in No. 87, at 5). Thus such claims of the United States *must* be subject to the jurisdiction of the State courts.[12] Certainly the United States in making such claims becomes a necessary party and cannot avoid jurisdiction by asserting the State procedures to be merely "administrative" or otherwise "burdensome". Being an admittedly "interested" and necessary party as to one class of rights, the Government should not be allowed to evade the Congressional purpose and render State adjudicatory proceedings meaningless by refusing to articulate *all* of its

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[12] In fact, the U.S. Forest Service made two such applications in Water Division 5 in March, 1970. The notice and resume published for March, 1970, by the Water Clerk in the District Court in and for Water Division No. 5 included the following:

4. Case No. W-30, U.S. FOREST SERVICE—WHITE RIVER NATIONAL FOREST, P.O. BOX 948, Glenwood Springs, Colorado, 81601, CAMP HALE PASTURE DITCH, the Southeast Corner of Section 23, Township 7 South, Range 80 West of the Sixth Principal Meridian, bears South 46° 11'E., 1880 feet; decree for 1.02 cubic feet per second, with priority date of September, 1969, for irrigation purposes.

5. Case No. W-31, U.S. FOREST SERVICE—WHITE RIVER NATIONAL FOREST, P.O. BOX 948, Glenwood Springs, Colorado, 81601, CAMP HALE POND, located in Section 9, T. 7S., R 80W., Sixth Principal Meridian; decree for 37.51 acre feet, with priority date of October, 1968, for Fish and Wildlife.

claims to water. Congress very definitely not only did not intend such a result—it was legislating to achieve the opposite.

In testifying at the hearings as to the position of the Department of Justice on S.18 the Special Assistant to the Attorney General made the same objections to the proposed legislation as are now made in this petition. He said:

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration of every State. We would be forced—I went back and cheked this when I got through with my last conversation with you—we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.[13]

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[13] Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., at 14 (1951).

The Senate Judiciary Committee nevertheless reported the bill favorably, specifically taking note of the Justice and Interior Department objections and concluded in rejecting them "... after a consideration of all of the evidence available to the Committee, that the legislation is meritorious" (S. Rep. No. 755, 82d Cong. 1st Sess. 2 (1951)).

CONCLUSION

The basic question of jurisdiction is important and should be reviewed now by this Court.

Respectfully submitted,

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